



Proposed Regulation Agency Background Document

Agency name	Department of Agriculture and Consumer Services
Virginia Administrative Code (VAC) citation	2 VAC 5-320-10
Regulation title	Rules and Regulations for the Enforcement of the Endangered Plant and Insect Species Act
Action title	Amendments to the list of endangered or threatened plant and insect species
Date this document prepared	December 30, 2009

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive provisions of new regulations or changes to existing regulations that are being proposed in this regulatory action.

The purpose of the present regulatory action is to amend the regulation to (1) remove the species that are no longer considered globally rare, (2) add those threatened or endangered plant and insect species that are considered to be globally rare, and (3) transfer from the list of endangered to threatened, those species whose populations are no longer in danger of extinction but are likely to become endangered in the foreseeable future.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

The term "rare" used in this document is a general concept meaning uncommon, infrequently occurring, or thin in density and does not refer to the specific population rarity rankings of plant and insect species.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Section 3.2-1002 of the Code of Virginia grants the Board of Agriculture and Consumer Services the authority to adopt regulations listing threatened or endangered species, their taking, quotas, seasons, buying, selling, possessing, monitoring of movement, investigating, protecting, or any other need in furtherance of the purposes of this chapter. As a result of investigations by the Commissioner of Agriculture and Consumer Services, recommendations received regarding candidate species from the Director of the Department of Conservation and Recreation, and from other reliable data, the Board shall approve proposed species to be added to, or deleted from, the list of threatened and endangered species, or to be transferred from one list to the other.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

This regulation protects those plants and insects found in Virginia whose populations are imperiled. Listing a species as threatened or endangered under the regulation offers protection to these plants and insects that are of aesthetic, ecological, educational, scientific, economic, or other value to the Commonwealth of Virginia. In addition, the regulation provides for the development and implementation of biologically sound and economically feasible protection, recovery, and conservation measures to ensure the survival of listed species while allowing citizens and businesses to operate in the most economically feasible manner with the least disruption to projects that may impact threatened or endangered species. Endangered or threatened species are benefited by (1) restrictions on the take and trafficking of listed species, (2) recognition of a species' precarious status, which provides for greater voluntary conservation efforts by stakeholders whose actions may impact a listed species, (3) establishment of programs for the management and conservation of listed species, (4) protection for the landowner, on whose property a listed species occurs, from unauthorized collecting, taking, cutting, etc., and (5) allowance for the legal harvest and export of threatened species under an approved management plan.

Substance

Please briefly identify and explain new substantive provisions (for new regulations), substantive changes to existing sections or both where appropriate. (More detail about all provisions or changes is requested in the "Detail of changes" section.)

VDACS recommends the regulation be amended by 1) removing one plant species from the regulation, 2) transferring seven plant species from the list of endangered species to the list of threatened species, and 3) adding seventeen plant and insect species to the threatened or endangered list.

The following species is recommended for removal from the regulation:

SCIENTIFIC NAME*Nestronia umbellula*COMMON NAME

nestronia

The following species are recommended for transfer in the regulation from endangered to threatened:

SCIENTIFIC NAME*Fimbristylis perpusilla**Helenium virginicum**Helonias bullata**Ilex collina**Isotria medeoloides**Scirpus ancistrochaetus**Spiraea virginiana*COMMON NAME

Harper's fimbristylis

Virginia sneezeweed

swamp pink

long-stalked holly

small whorled pogonia

Northeastern bulrush

Virginia spiraea

The following species are recommended for addition to the regulation as endangered:

SCIENTIFIC NAME*Boltonia montana**Iliamna remota**Isoetes virginica**Ludwigia ravenii**Pseudanophthalmus hubbardi**Pseudanophthalmus thomasi*COMMON NAME

valley doll's-daisy

Kankakee globe-mallow

Virginia quillwort

Raven's seedbox

Hubbard's cave beetle

Thomas' cave beetle

The following species are recommended for addition to the regulation as threatened:

SCIENTIFIC NAME*Clematis addisonii**Clematis viticaulis**Lilium pyrophilum**Ludwigia brevipes**Packera millefolia**Paxistima canbyi**Phlox buckleyi**Potamogeton tennesseensis**Pycnanthemum clinopodioides**Pycnanthemum torrei**Rudbeckia heliopsidis*COMMON NAME

Addison's leatherflower

Millboro leatherflower

sandhills lily

Long Beach seedbox

yarrow-leaved ragwort

Canby's mountain-lover

sword-leaf phlox

Tennessee pondweed

basil mountain-mint

Torrey's mountain-mint

sun-facing coneflower

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

The primary advantage of the proposed amended regulation is the protection of designated threatened or endangered plant and insect species that are considered globally rare. Once plants or insects are listed, the regulation enables the Virginia Department of Agriculture and Consumer Services to work with landowners to minimize the impact on protected species while, in many instances, allowing development to proceed. The Virginia Endangered Plant and Insect Species Act along with Rules and Regulations for the Enforcement of the Endangered Plant and Insect Species Act ensure a balance between economic development and species conservation. The statute includes a provision allowing for the removal or destruction of a state listed species, when good cause is shown and when necessary to alleviate damage to property, impact on progressive development, or to protect human health.

Species protected by the Virginia Endangered Plant and Insect Species Act may also be subject to federal guidelines regarding federally listed species, when federal funds or federal lands are involved. The landowner must consult with the United States Fish and Wildlife Service to mitigate impacts on federally listed species.

Whereas federal protection of threatened and endangered plant and insect species is limited to federal lands or when utilizing federal funds, the Virginia Endangered Plant and Insect Species Act protects listed plants and insects on all Virginia public and private lands while exempting the landowner from its provisions.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal, which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no applicable federal requirements that are more restrictive.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

No localities are uniquely affected by the proposed amendments to the regulation as they will apply statewide.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

In addition to any other comments, the Board of Agriculture and Consumer Services is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the Board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2)

probable impact of the regulation on small businesses, and 3) description of less intrusive or costly methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so via the Regulatory Townhall website, www.townhall.virginia.gov, or by mail, email or fax to: Keith Tignor, P.O. Box 1163, Richmond, VA, 23218, Email: keith.tignor@vdacs.virginia.gov, FAX: 804-371-7793. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by the last date of the public comment period.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source, and (b) a delineation of one-time versus on-going expenditures.	The Virginia Department of Agriculture and Consumer Services currently spends approximately \$89,534 in state general funds (Fund 01/Detail 00) and \$30,000 in federal funds to implement the Virginia Endangered Plant and Insect Species Act and this regulation. Projected annual expenditures in the Endangered Species Program (Cost Code 820) are \$72,531 in personnel and travel costs and \$17,000 in conservation grants. All of these expenditures are on-going.
Projected cost of the new regulations or changes to existing regulations on localities.	No additional costs on localities are anticipated.
Description of the individuals, businesses or other entities likely to be affected by the new regulations or changes to existing regulations.	Any major construction conducted by public or private construction companies on land that is not owned by the builder is subject to this regulation.
Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	Less than 1% of development projects are impacted by the existing statute and regulation. Virginia statute requires the review of approximately 1,000 requests annually for information regarding anticipated impacts of proposed projects to threatened or endangered plant or insect species listed in this regulation. VDACS does not collect information which would identify a business as a small business. It appears many small businesses are the owners of the property on which development would occur; since EPISA requirements do not apply to the property owners, it is anticipated that the impact to such businesses will be minimal.
All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and do include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.	Generally, a cost of several hundred dollars is required by a developer to conduct a survey for endangered or threatened plants or insects that are known to be in the vicinity of a construction project. Less than 1% of the surveys detect listed plants or insects which require the developer to incorporate

Specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.	mitigating practices into their project.
Beneficial impact the regulation is designed to produce.	The purpose of the statute and regulation is to protect and prevent extremely rare populations of plant and insect species from becoming extinct in Virginia and in some cases globally.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

There are no other viable alternatives to the proposed regulatory actions.

Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

Due to the mandate for this regulation in accordance with §3.2-1002(B) of the Code of Virginia (1950), as amended, an alternative regulatory measure does not exist. Federal protection of threatened or endangered plants or insects is only afforded to federal lands or development utilizing federal funding. Virginia's Endangered Plant and Insect Species Act and this regulation offer protection of listed threatened or endangered plants or insects on all Virginia public and private lands.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

Commenter	Comment	Agency response
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Melanie Smith	<ol style="list-style-type: none"> 1. The proposed list does not contain plants and insects UNIQUE to Virginia. Unless all other states join in, why should Virginia be responsible for these bugs and weeds? 2. Until such time that the economy improves, it is unlikely that citizens are going to go out to purchase plant and insect killer at the levels they may have in the past. 3. During this bad economy, people get angry when the state wastes time and money on NON-URGENT issues. Virginia lawmakers should try to reduce government and UNNECESSARY regulation when families are struggling to feed their families. Preserving these things should be left to the 4H clubs, Boy Scouts, etc. 4. Don't you think people in this state have enough to worry about right now? If IRAN nukes us, there won't be any weeds and bugs anyway. 	<ol style="list-style-type: none"> 1. Species contained in the Regulations for the Endangered Plant and Insect Species Act (EPISA) are not required to be unique to the Commonwealth of Virginia. Such species must be in danger of extinction or likely to become an endangered species in the foreseeable future throughout all or a significant part of its range unless otherwise determined by the Commissioner (VAC § 3.2-1000). Several protected species are found only in Virginia. Others may be found in only a few locations outside of the State. Candidate species are likewise required to be, or likely to become, an endangered species throughout all or a significant portion of its native range in order to be included in the regulation. 2. Threats to regulated species include, but are not limited to, harvesting for collection or sale, roadway construction, housing development, power-line installation, bridge construction, and pest control. Inclusion in the regulations provides necessary protection for plant and insect species in jeopardy of extinction from adverse activities that could result in its removal, take, or loss of habitat (COV § 3.2-1003). 3. Periodic review of these regulations is a required activity as directed in EPISA (COV § 3.2-1002). Review of the regulations is beneficial in determining the status of plant and insect species for listing, transfer from one list to another, or delisting. The Department of Agriculture and Consumer Services encourages conservation efforts undertaken by other state and Federal agencies, as well as, landowners, private businesses, non-profit organizations, and conservation groups to ensure the survival and continued availability of these valuable natural resources. 4. Threat of nuclear attack is beyond regulatory authority of the Department of Agriculture and Consumer Services.
David E. Lee	I am not for expanding the list of endangered species. Too many regulations now. Cut back.	Consideration by the Board of Agriculture and Consumer Services includes reduction or elimination of this regulation. Where adequate information is available to determine if management measures are necessary to assure continued ability to sustain successfully plant and insect species which are likely to become endangered or in danger of extinction

		throughout all or a significant part of its range, the Board is directed in the Code of Virginia (1950) as amended, § 3.2-1002, to approve proposed species to be added to or deleted from the list of threatened species or the list of endangered species, or to be transferred from one list to the other .
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Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

Unless otherwise discussed in this report, the amendments to this regulation will have no impact upon families.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact if implemented in each section. Please detail the difference between the requirements of the new provisions and the current practice or if applicable, the requirements of other existing regulations in place.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all provisions of the new regulation or changes to existing regulations between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

Current section number	Current requirement	Proposed change, rationale, and consequences
2 VAC 5-320-10	Establishes lists of endangered and threatened species.	<p>B. The following plant and insect species are hereby declared an endangered species:</p> <p><u>1. Boltonia Montana, valley doll's-daisy</u></p> <p>4. 2. Cardamine micranthera, small-anthered bittercress.</p> <p>2. 3. Carex juniperorum, juniper sedge.</p> <p>3. 4. Corallorhiza bentley, Bentley's coralroot.</p> <p>4. Fimbristylis perpusilla, Harper's fimbriatylis.</p>

		<p>5. Helonium virginicum, Virginia sneezeweed.</p> <p>6. Helonias bullata, swamp-pink.</p> <p>7. Ilex collina, long-stalked holly.</p> <p>8. 5. Iliamna corei, Peter's mountain <u>Mountain mallow.</u></p> <p>6. Iliamna remota, Kankakee globe-mallow.</p> <p>7. Isoetes virginica, Virginia quillwort.</p> <p>8. Ludwigia ravenii, Raven's seedbox.</p> <p>9. Isotria medeoloides, small whorled pogonia.</p> <p>40. 9. Neonympha mitchellii, Mitchell's satyr butterfly.</p> <p>10. Pseudanophthalmus holsingeri, Holsinger's cave beetle.</p> <p>11. Nestronia umbellula, nestronia.</p> <p>11. Pseudanophthalmus hubbardi, Hubbard's cave beetle.</p> <p>12. Pseudanophthalmus thomasi, Thomas' cave beetle.</p> <p>42. 13. Ptilimnium nodosum, harperella.</p> <p>43. 14. Puto koztarabi, Buffalo Mountain mealybug.</p> <p>14. Pseudanophthalmus holsingeri, Holsinger's cave beetle.</p> <p>15. Scirpus ancistrochaetus, Northeastern bulrush.</p> <p>46. 15. Sigara depressa, Virginia Piedmont water boatman.</p> <p>17. Spiraea virginiana, Virginia spiraea.</p> <p>48. 16. Trifolium calcaricum, running glade clover.</p> <p>C. The following plant and insect species are hereby declared a threatened species:</p> <p>1. Aeschynomene virginica, sensitive-joint vetch <u>sensitive-joint vetch.</u></p> <p>2. Amaranthus pumilus, seabeach amaranth.</p> <p>3. Arabis serotina, shale barren rock-cross <u>rockcress.</u></p> <p>4. Cicindela dorsalis dorsalis, Northeastern beach tiger beetle.</p> <p>5. Echinacea laevigata, smooth coneflower.</p> <p>5. Clematis addisonii, Addison's leatherflower.</p> <p>6. Juncus caesariensis, New Jersey rush.</p> <p>6. Clematis viticaulis, Millboro leatherflower.</p>
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